BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NORMAN R. GIDEON, JR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,043,042
YOST PROPERTIES	)	
Respondent	)	
AND	)	
	)	
FIRST COMP INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant and Respondent requested review of the December 21, 2012[1], Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on April 19, 2013.

APPEARANCES

Angela D. Trimble, of Pittsburg, Kansas, appeared for the claimant. Joseph R. Ebbert, of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.[2] At the regular hearing held on August 24, 2012, the parties stipulated that the preliminary hearing transcripts of April 3, 2009, December 4, 2009, October 4, 2010, and January 27, 2012, including the attached exhibits are to be included in the record for the purpose of determining this matter.[3] The parties further stipulated that the nature and extent of claimant's injuries and disability are no longer issues before the Board in this appeal. Therefore, if this matter is ruled compensable, the 17.5 percent whole person

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[1] A Nunc Pro Tunc was issued to correct the Award calculation.

[2] It should be noted that the Deposition of Allen Parmet, M.D., was taken on October 31, 2011, not 2012, and the Deposition of Delores Wishart was taken on October 5, 2009, not 2012.

[3] R.H. Trans. at 5-6.

functional impairment and 76 percent permanent partial general (work) disability determined by the ALJ will be used in the calculation of any award granted claimant.

ISSUES

The Administrative Law Judge found Dr. Parmet's testimony not credible that claimant was hallucinating at the time of the accident. There was no evidence in the record claimant did anything more than simply stand up while brushing off ants and fall through a deteriorated portion of the roof. The ALJ went on to find claimant to be a credible witness and that his accidental injury arose out of and in the course of his employment. Additionally, there was insufficient evidence that claimant's alleged intoxication contributed to his injury and/or disability. The ALJ awarded claimant a 17.5 percent functional impairment to the body as a whole followed by a 76 percent permanent partial general (work) disability.

Claimant argues that respondent failed to meet its burden of proving drug and/or alcohol intoxication pursuant to K.S.A. 44-501(d)(2), failed to prove any alleged intoxication contributed to or caused the accident on May 18, 2008, and failed to establish that there was an overpayment of temporary total disability benefits.

Respondent argues that the claim should be barred due to the claimant's intoxication, which contributed to the accident. Respondent contends that any benefits paid to claimant should be subject to reimbursement from the Fund for both temporary total disability compensation (TTD) already paid in the amount of $39,000.32, which includes 55 weeks of an alleged overpayment of temporary total disability compensation, as well as medical benefits totaling $114,352.44. In the event the Board rejects the intoxication defense, respondent argues the calculated award should be reduced to reflect the overpayment of temporary total disability compensation, which would result in an adjustment of the 76 percent work disability calculation and how and when the weeks determined to be due and owing to claimant would be calculated.

Claimant contends the ALJ erred in determining the nature and extent of claimant's injuries and disability, but claimant's brief goes on to request the Award of the ALJ be affirmed. At oral argument to the Board, the issue dealing with the nature and extent of claimant's injuries and disability was withdrawn from the Board's consideration. Claimant requests that the Award Nunc Pro Tunc be clarified to note claimant is not deceased.

Respondent raises the following issues for the Board's consideration:

1. Did the ALJ err in failing to preclude this claim, pursuant to the intoxication defense raised by respondent and its insurance carrier, based upon K.S.A. 44-501(d)? Did the ALJ further err in failing to find that said intoxication contributed to the accident in question?

2. Did the ALJ err in failing to determine an overpayment of temporary total disability benefits once the claimant had been placed at maximum medical improvement by his own physician, and did the ALJ fail to give proper credit for said overpayment of benefits in the calculation of any potential permanent partial disability award?

3. Did the ALJ incorrectly calculate the value of the Award and improperly determine that the Award was all due and owing?

FINDINGS OF FACT

Claimant was injured on May 18, 2008, while working part-time for respondent and full-time for Southeast Kansas Independent Living (SKIL). At the time of the accident, claimant was replacing a roof for respondent when he fell 8 to 10 feet through the rafters in the ceiling, catching his arm and landing on his "butt" on a concrete pad.[4] After the fall, claimant had such extreme pain in his back, he didn't realize that his arm was ripped open. Claimant testified that he had been up on the roof for about 30 minutes before it collapsed and he fell. When claimant fell off the roof he fractured his L1 vertebra.

Claimant received initial treatment at Mt. Carmel Regional Medical Center in Pittsburg, Kansas, and was then life flighted to St. John's Hospital in Joplin, where Dr. Curtis performed surgery, placing pins and rods in claimant's back. Claimant eventually had a fusion from T12 to L2. Claimant was advised to try pain management and physical therapy. He went to physical therapy for 5 weeks. Claimant treated with Dr. Curtis until March 20, 2009, with complaints of low back pain and left side hip pain.

Despite treatment, claimant continued to have stiffness in his low back, and pain shooting from his left hip down his left leg. Claimant stated that he has not tried to get back on a roof and has not been able to work since the accident. Claimant stated that it hurts to sit, so he tries to sit and lay at the same time, but continues to hurt all of the time.

Respondent maintains that claimant was intoxicated by alcohol, cocaine and/or marijuana at the time of the accidental injury, and therefore benefits should be denied. Claimant denies being intoxicated from or of ever using marijuana or cocaine. He does admit to having two or three beers three hours or more before the accident. Claimant denies consuming alcohol at the job site.

Claimant testified as follows about the accident on the day he was injured:

> Q. Okay. Now, when you reported to Mt. Carmel -- well, when you were taken to Mt. Carmel, it looks like there is an indication that perhaps that you had consumed some beer?

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[4] P.H. Trans. (Apr. 3, 2009) at 6-7.

A. Yes.

Q. Is that right?

A. I had a beer, yes.

Q. Were you drinking while you were doing the job on the porch?

A. No.

Q. Okay. Had you -- you had had beer that day?

A. Yes.

Q. What day of the week was this?

A. Sunday.

Q. Okay. It looks like there might have been a urinary drug screen that was also done and it indicates a positive for cocaine, marijuana and opiates, although it references that you had been given morphine prior to the test being taken. Were you under the influence of cocaine?

A. No.

Q. Were you under the influence of marijuana?

A. No.

Q. And you are asking the Court for additional medical treatment; correct?

A. Yes.[5]

. . . .

Q. Okay. And at the emergency room, your attorney brought this up, you said -- told them at the emergency room you had had three beers three hours before; is that correct?

A. I don't know if that is correct.

Q. Did you say that?

A. I don't know. I was in a lot of pain.

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[5] P.H. Trans. (Apr. 3, 2009) at 17-18.

Q. Well you don't recall whether you said that, is that your testimony?

A. I think so.

Q. I'm asking what your testimony is today, whether you remember saying that at the hospital?

A. No. I don't remember saying that at the hospital.

Q. Was what you said, what was recorded, is that correct, or incorrect whether you had had three beers three hours before?

A. No.

Q. How much beer had you consumed before the time of the accident?

A. Maybe two.

Q. At what time?

A. Approximately 11:00.

Q. 11:00 a.m. on Sunday?

A. Yeah.

Q. And you went to work about what time?

A. About 3:00, 3:30.

Q. And your attorney also mentioned the fact that the drug screen at the hospital came positive for cocaine. You indicated that you were not under the influence of cocaine at the time of the accident. Is that your testimony?

A. Yes.

Q. When was the last time you consumed cocaine before the day of the accident?

A. I hadn't. I don't know where that came from.

Q. So you deny ever consuming cocaine?

A. Yes.

Q. You don't know how it got into your system?

A. No.

Q. How about the positive test for THC, when is the last time you had consumed THC or marijuana products prior to the time of the accident?

A. I don't know. I don't know where it came from.

Q. So you deny every consuming THC products?

A. Yes.

Q. Within a week before the accident?

A. With any time.

Q. At any time.

A. Yes.[6]

Delores Wishart, laboratory director for Mt. Carmel Medical Center in Pittsburg, Kansas, testified that her job is to handle all of the administrative work for the lab and to assist the medical director. She testified that she is familiar with the policies and procedures of the lab and how the different types of tests are done.[7]

Ms. Wishart testified that claimant's blood sample for a comprehensive metabolic panel was taken at 4:25 p.m. on May 18 and that his urine sample was taken at 7:36 p.m. and tested at the hospital on May 18. She stated that claimant's blood and urine samples were taken at different times due to the method of collection required and the condition claimant was in when he came into the emergency room.[8]

Ms. Wishart testified that she is not sure why the blood test was ordered, but indicated that in the emergency room the doctors like to know if the patients are taking any over the counter medications in case they need to go to surgery[9] and when administering other medications or anesthetics[10] in order to avoid any bad reactions. All urine and blood samples are kept for 7 days. Ms. Wishart stated that the fact that claimant tested positive for opiates was very likely due to the morphine he received when he came into the

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[6] P.H. Trans. (Apr. 3, 2009) at 24-26.

[7] Wishart Depo. at 4.

[8] *Id.* Depo. at 10.

[9] *Id.* Depo. at 11.

[10] *Id.* at 15,16.

emergency room. She testified that she couldn't say how the cocaine or marijuana ended up in claimant's system.

Ms. Wishart was not present when claimant's samples were taken. Therefore she is not aware of the chain of custody of the samples and testified that "there was no chain of custody on these other than the normal course of our medical treatment".[11] She was not able to answer whether the test results were a false positive or not. She testified these were not ordered as legal drug screens, in which case there would have been a chain of custody and would not have been tested in the hospital lab, but transferred to the police to handle everything.

Ms. Wishart stated that the labs that are done and need to be analyzed quickly are sent to Regional Medical Laboratory in Tulsa. This lab also has the equipment to do gas chromatography mass spectrometry (GCMS). The Board notes that the exhibits attached to the preliminary hearing transcripts, including the medical records detailing the post-injury testing performed on claimant and claimant's levels of alcohol, cocaine, marijuana and opiates were admitted into the record at the time of the regular hearing without objection.

Courtney Harrison, formerly Courtney Tyrell, a part-time paramedic with Crawford County EMS, and former tech for the Mt. Carmel Hospital Emergency department, testified that she would put in orders for the doctors and was involved in patient care.

Ms. Harrison testified that it is the doctor's determination whether a blood alcohol test needs to be ordered, and that there is a protocol for collecting blood samples. It is Ms. Harrison's job to enter the doctor's orders into the computer system. Once the sample is taken, it is transported from the emergency room to the lab, where the tests are run and the results posted in the emergency department.

At respondent's request, board certified occupational and preventive medical specialist Allen J. Parmet, M.D., reviewed extensive medical records on claimant, and issued a report on March 24, 2010. Dr. Parmet analyzed the information regarding claimant's blood and urine tests and opined that claimant was intoxicated at the of the accident. In Dr. Parmet's opinion, it was this intoxication that caused claimant's accident and injury. Dr. Parmet stated in his report that the Benadryl alone that claimant had taken on the date of accident would be enough to impair him. He found it significant that the emergency room nurse noted claimant "smells of alcohol".[12] Dr. Parmet noted claimant denied the use of cocaine and marijuana at any time prior to the accident. According to the

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[11] *Id.* at 22.

[12] Parmet Depo., Ex. 2 at 1 (Dr. Parmet's Mar. 24, 2010, report).

doctor, screening tests will remain positive for marijuana for seven days after a single use. Tests will remain positive for cocaine for three days at most.[13]

Dr. Parmet analyzed the blood alcohol levels in claimant's system at testing time and opined that for claimant's blood alcohol levels to be as reported, claimant would have needed to have consumed 48 ounces of beer (four 12 oz. beers) over a period of approximately one half hour. He also noted these types of tests are routinely performed for medical purposes. In Dr. Parmet's opinion, claimant was clearly under the influence of alcohol and intoxicated at the time of the accident.

On March 24, 2010, Dr. Parmet again reviewed claimant's records and also read claimant's deposition from June 9, 2010. He concluded claimant had a fracture at L1 status post T12-L1 posterior fusion; alcohol intoxication; and cocaine and marijuana abuse. He stated in his report that on the date of accident claimant's blood was tested and he had a blood alcohol level of 95 mg/dL. The blood sample was taken one hour after the accident. Dr. Parmet noted that claimant told the emergency room personnel that he had consumed three beers earlier that day.

Dr. Parmet concluded claimant was clearly under the influence of alcohol and intoxicated at the time the accident occurred. Claimant admitted to taking Benadryl on the morning of the accident, but denied any recreational drug use. Dr. Parmet opined that the degree of claimant's intoxication demonstrates that his balance, while working on a roof, was adversely affected and clearly would have contributed to, if not completely caused, claimant to react to the reported exposure of ants, to lose his balance and to fall while on-the-job on May 18, 2008.

In a September 8, 2010, report, Dr. Parmet wrote that after reviewing claimant's deposition testimony, he continued to believe claimant was under the influence of alcohol and intoxicated at the time of the accident. There is however, no evidence as to what the level of cocaine or THC was present in claimant's system at the time of the accident.[14] In Dr. Parmet's opinion, this level of intoxication impaired claimant's judgment, coordination and balance.

On September 14, 2012, Dr. Parmet performed an examination of claimant, at respondent's request. Claimant had ongoing pain complaints in his mid and lower back with the pain mostly in the sacroiliac area. Claimant rated the pain at 7 out of 10 but no longer reported radiating pain into his legs. Dr. Parmet again reviewed extensive medical and non-medical records and opined claimant's blood alcohol level at the time of the accident would have been higher than the legal limit for driving a motor vehicle in Kansas,

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[13] *Id.* at 6.

[14] *Id.* at 49-50.

either private or commercial. Also, even though claimant denied using cocaine or marijuana at any time, the tests came back positive on both. These drugs would affect claimant's judgment and reaction time.

PRINCIPLES OF LAW AND ANALYSIS

K.A.R. 51-3-8(c) states:

> (c) The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage. Evidence shall be confined to the matters actually ascertained to be in dispute. The administrative law judge shall not be bound by rules of civil procedure or evidence. Hearsay evidence may be admissible unless irrelevant or redundant.

There appears to be some confusion regarding whether the records detailing the testing done on claimant pursuant to K.S.A. 2007 Supp. 44-501(d)(2) are part of the record in this matter. At the regular hearing, the parties stipulated that all preliminary hearing transcripts including any exhibits attached to those transcripts were to be included in this record. No request was ever made to withdraw that stipulation and claimant lists the inclusion of the preliminary hearing exhibits as part of the record in his submission letter to the ALJ. The ALJ ruled on the objections to the exhibits 2,3,4 and 7 to Dr. Parmet's deposition. The Board finds the logic and reasoning of the ALJ to be well set forth and adopts same as its own. The test results detailing claimant's levels of intoxication and the positive findings with regard to alcohol, cocaine and marijuana were attached to the preliminary hearing transcripts, and pursuant to the stipulation of the parties and the rulings of the ALJ, are included in this record for the Board's consideration.

K.S.A. 2007 Supp. 44-510c(b)(2) states:

> Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

Respondent contends claimant was overpaid TTD for approximately 55 weeks (actual time period is 54.71 weeks) from January 25, 2011, the day Dr. Prostic determined claimant had suffered a 20 percent whole person functional impairment and gave claimant permanent restrictions, to February 12, 2012, the day TTD was stopped. The issue dealing with the amount of TTD due was listed in both submission letters to the ALJ, and an

overpayment was claimed by respondent in its submission letter to the ALJ. Nevertheless, the issue was not listed, nor discussed by the ALJ in the Award.

Dr. Prostic last examined claimant on January 25, 2011, at which time claimant was rated pursuant to the AMA Guides, and given permanent restrictions. No physician found claimant to be temporarily and totally disabled after that date. The Board finds claimant's right to collect TTD ended on January 25, 2011, at the time of Dr. Prostic's last examination. Any overpayment will be allowed as a credit against any sums found due and owing claimant in this matter.

K.S.A. 2007 Supp. 44-501(d)(2) states:

> (2) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months. It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

	Confirmatory test cutoff levels (ng/ml)
Marijuana metabolite [1]	15
Cocaine metabolite [2]	150
Opiates:	
Morphine	2000
Codeine	2000
6-Acetylmorphine [4]	10 ng/ml
Phencyclidine	25
Amphetamines:	
Amphetamine	500
Methamphetamine [3]	500

[1] Delta-9-tetrahydrocannabinol-9-carboxylic acid.

[2] Benzoylecgonine.

[3] Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.

[4] Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

> An employee's refusal to submit to a chemical test shall not be admissible evidence to prove impairment unless there was probable cause to believe that the employee used, possessed or was impaired by a drug or alcohol while working. The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met:
> (A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;
> (B) the test sample was collected at a time contemporaneous with the events establishing probable cause;
> (C) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;
> (D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
> (E) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and
> (F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

There is little doubt claimant was, to some degree, impaired due to the alcohol cocaine and marijuana in his system. As noted by the Kansas Court of Appeals in *Wiehe*[15], it is respondent's burden of proving both the impairment and the contribution of that impairment to the accident. Prior to 1993, K.S.A. 44-501(a) contained a much more stringent burden of proof on an employer. The original standard of proof, enacted in 1967 required the injury to result "solely" from an employee's intoxication. That burden was lessened somewhat in 1974 when the language of the statute was changed from solely to "substantially". In 1993, the burden was lessened even more when the language was again changed to require the injury, disability or death be "contributed to by the employee's use of or consumption of alcohol". The Court, in *Wiehe* noted the legislature also established a conclusive presumption of impairment if certain quantitative levels of alcohol or drugs were shown from an employee's chemical tests. Once it is established that an employee was impaired under K.S.A. 44-501(d), no additional evidence or argument can overcome that fact.[16] Thus, in this instance, claimant was impaired at the time of the accident.

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[15] *Wiehe v. Kissick Construction Co.,* 43 Kan. App. 2d 732 (2010).

[16] *Id.* at 744.

However, the law in Kansas requires proof that the impairment, in some way, contributed to the injuries and/or disability suffered by claimant on the date of accident.[17] Claimant's description of the accident is rather simple. He was working on an old roof, when he noticed ants crawling on him, not an unusual situation when dealing with an old house. He stood up to get the ants off of him and a portion of the old roof gave way and claimant fell. Dr. Parmet's contention that a different person would have reacted differently, with a different result, is based upon speculation. To assume that claimant should have been able to look at the roof and determine its structural strength is not a persuasive argument. Dr. Parmet also seems to assume that no ants were actually present and claimant was hallucinating due to the alcohol and drug exposure, another unsupported assumption. The ALJ found Dr. Parmet's testimony on this issue to lack credibility and the Board agrees. Additionally, the ALJ went on to find claimant to be a credible witness. The ability to observe and evaluate a witness is a luxury the Board does not have.

The ALJ determined that respondent had failed to prove claimant's impairment in some way contributed to the accident in question. The collapse of the roof under claimant involved no contribution do to intoxication. This record does not support a finding that claimant should have been aware of the weakened state of that roof. The Board agrees that respondent has failed to carry its burden on this issue. Therefore, the Award of the ALJ granting claimant benefits in this matter is affirmed.

In the Award, the ALJ granted claimant 194.5 weeks of TTD and 178.98 weeks of permanent partial disability, (PPD) with all weeks being due and owing. It is apparent that this ALJ, who traditionally awards both TTD and PPD during the same weeks, has done so again. The Board has held, many times in the past, that TTD and PPD are not synonymous and a claimant cannot be both temporarily and permanently disabled during the same weeks. The Award calculation will be adjusted accordingly.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award and Award Nunc Pro Tunc of the ALJ should be modified to give respondent credit for 54.71 weeks of TTD overpayment and to adjust the award of both TTD and PPD to ensure they are not being paid during the same weeks, but is affirmed in all other regards. Respondent failed to prove claimant's intoxication contributed to the accident on May 18, 2008.

The Board also clarifies that the claimant is not deceased as was stated in the Award and the Award Nunc Pro Tunc and the record is corrected accordingly.

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[17] *Id.*

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 21, 2012, is modified to allow respondent credit for an overpayment of 54.71 weeks of TTD and to pay TTD and PPD during separate weeks, and not concurrently as was apparently ordered by the ALJ. In all other regards the Award and Award Nunc Pro Tunc of the ALJ are affirmed in so far as they do not contradict the findings and conclusions contained herein.

Claimant is entitled to temporary total disability compensation at the rate of $200.01 per week for 139.79 weeks, totaling $27,959.40, followed by 123.35 weeks of permanent partial general disability compensation at the rate of $200.01 per week, totaling $24,671.23, for a total due and owing of $52,630.63, which is ordered paid in one lump sum, minus any amounts previously paid. Thereafter, claimant is entitled to 97.21 weeks of permanent partial disability compensation at the rate of $200.01 per week totaling $19,442.98, for a total award of $72,073.61, until fully paid, or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of June, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge